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QUESTIONS PRESENTED

1. Whether the Texas capital-sentencing statute is unconstitutional as applied to Penry for failing to require specific instructions regarding balancing of aggravating and mitigating circumstances and for failing to define some of the terms used in the special issues on punishment.

2. Whether it is a violation of the eighth amendment proscription against cruel and unusual punishment to execute a death-sentenced inmate who has limited mental capacity but who (1) was adjudged competent to stand trial, (2) was found to be sane at the time of the offense and (3) is aware of the nature of the sentence and the reasons it was assessed against him.

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No. 87-6177

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

JOHNNY PAUL PENRY,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the district court's denial of habeas relief is included in the Joint Appendix, hereinafter "J.A.," at pages 284-319. *Penry v. Lynaugh*, 832 F.2d

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "Penry."

915 (5th Cir. 1987). The unpublished opinion of the district court is included in the Joint Appendix at pages 234-73. *Penry v. Lynaugh* No. L-86-89-CA (E.D. Tex. 1987).

JURISDICTION

Penry has invoked the jurisdicti· n of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Penry relies on the fifth and eighth amendments to the Constitution. Also at issue here is the Texas statute which sets out the special issues at the punishment phase of a capital trial. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1986).

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

The state has lawful custody of Penry pursuant to a judgment and sentence of the 258th Judicial District Court of Trinity County, Texas, in Cause No. 6572, styled *The State of Texas v. Johnny Paul Penry*. On November 7, 1979, Penry was indicted for the offense of capital murder of Pamela Carpenter while in the course of committing and attempting to commit the offense of aggravated rape, to which he entered a plea of not guilty (SF XIII 1344).[2]

[2]"SF" refers to the statement of facts, with reference made to the volume number typewritten on the bottom of the cover of each volume and page number as reflected in the lower right hand corner of each page. "Tr." refers to the transcript of Penry's state court proceedings.

Penry's pretrial motions were heard on January 11, 1980 (SF III 28-83), including a motion for change of venue which was granted on that date (SF III 84-101). His pretrial motions were continued on February 29, 1980, and a hearing was held on his motion to suppress his confessions (SF IV). Detailed findings of fact and conclusions of law denying the motion to suppress were filed on March 25, 1980 (Tr. 94). An extensive hearing on Penry's challenge to his competency to stand trial was held before a jury on March 10-13, 1980 (SF V-VII), and the jury found him competent (SF VII 944-45).

Trial began on March 24, 1980, and on April 1, 1980, the jury found Penry guilty of the capital offense (Tr. 111; SF 2533). On April 1, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1987) (J.A. 231-33; Tr. 118-119; SF XVII 2698-2703).

Penry appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed on January 9, 1985. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985) (en banc). Rehearing was denied on May 2, 1985. Certiorari was denied on January 13, 1986. *Penry v. Texas*, ___U.S.___, 106 S.Ct. 834 (1986).

Penry was formally sentenced to be executed before sunrise on May 7, 1986. He filed a state habeas application pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 § 2 (Vernon Supp. 1988) on April 10, 1986. The state convicting court recommended denial on April 25, 1986. The Texas Court of Criminal Appeals denied the application and motion for stay of execution on May 5, 1986. *Ex parte Penry*, Application No. 15918-01.

On May 5, 1986, Penry filed an application for writ of habeas corpus and a motion for stay of execution in the United States District Court for the Eastern District of Texas, Lufkin Division. *Penry v. McCotter*, No. L-86-89-CA. The district court entered a stay of execution on May 6, 1986. An order denying all habeas relief was entered on April 28, 1987, and the stay of execution was vacated. The district court granted Penry's request for certificate of probable cause to appeal, and on November 25, 1987, the Court of Appeals for the Fifth Circuit affirmed. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987). Rehearing and rehearing en banc were denied on December 23, 1987.

B. *Statement of Facts*

Johnny Paul Penry was hired by Harold Stubblefield to deliver a freezer to the home of the deceased, Pamela Carpenter. Penry assisted with the delivery on October 9, 1979 (SF XIII 1351-65, 1377).

On October 25, 1979, between 9:00-9:30 a.m., the deceased spoke with her mother, Mrs. Rossie Moseley (SF XIII 1384). At about 10:00 a.m. she phoned a friend, Cindy Peters, and said, "This is Pam. I've been stabbed and raped. Mother's at the church. Help me and hurry." (SF XIII 1391-92, 1397-99, 1407). Peters went immediately to the deceased's residence and observed the deceased on her bed, covered with blood and moaning for help (SF XIII 1393, 1399-403). An ambulance was immediately called (SF XIII 1428-30).

Officer E. G. Page of the Livingston Police Department arrived on the scene at 10:26 a.m. (SF IV 255; XIII 1441), and spoke to the deceased (SF IV 253-54; XIII 1443), who told him her attacker was a white male, about twenty years old, short, thin with short, dark curly hair, and was wearing a plaid shirt, "possible flowers" and blue jeans (SF XIII 1446, 1449-

50). The emergency technicians arrived soon thereafter to discover the deceased in a state of shock and bleeding (SF XIII 1481-85, XIV 1822).

The deceased received extensive emergency treatment in the hospital (SF XIII 1502-18). During the first hour, she was conscious and talking (SF XIII 1513-15, 1558). She stated that she had been stabbed with scissors and raped by a short, thin, white male with black hair. She stated that she had seen him before but did not know his name[3] (SF XIII 1524-26, 1558). The deceased's condition deteriorated and she died at approximately noon during the emergency treatment. The cause of death was massive hemorrhage and the chest injury (SF XV 2081), which was consistent with having been stabbed with a pair of scissors (SF XIII 1519-20, 1563; XV 2077-79, 2094). The deceased also had a large bruise on her left side of her eye consistent with having been struck by a fist, multiple bruises on her legs, a bruise on her throat consistent with hand strangulation, a bruise on the left rib cage about the size of a man's shoe heel, and a defensive wound on her hand (SF XIII 1506, 1557; XV 2063-81). Semen was observed on the genital area during the emergency treatment (SF XIII 1563-64); the deceased had extensive urinary tract hemorrhaging, however, and no semen was found during the autopsy (SF XV 2082).

Deputy Sheriffs Billy Ray Nelson and Bob Grissom received a description of the assailant over the patrol car radio at approximately 11:00 a.m. (SF IV 136-37, 159-62, 173; XIV 1568-69, 1639-40). Nelson was familiar with Penry, who fit the dispatched description and had recently been released from the

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[3]Her description given to Dr. McLendon was not admitted before the jury (SF XIII 1533).

Texas Department of Corrections for rape (SF IV 138; XIV 1569). They proceeded to Penry's father's home, spoke with Penry and inquired of his whereabouts. Penry responded that he had been home about an hour (SF XIV 1570, 1639, 1641). The officers informed him that a woman had been cut or stabbed and raped (SF IV 139-40; XIV 1572). Penry denied any knowledge (SF XIV 1570-72), but he agreed to accompany the officers to the police station (SF IV 140; XIV 1573-75, 1594-95, 1643, 1656-57).

Within moments after their arrival, Ted Everitt, an investigator for the district attorney's office, advised Penry of his *Miranda*[4] rights off the standard police-issued card (SF IV 142, 145-47; XIV 1579, 1589, 1669-75). Penry did not request a lawyer (SF XIV 1589). At this time Officer Grissom noticed blood on the upper back shoulder of Penry's shirt and asked him about it. Penry responded that he had fallen on a stick while riding his bicycle earlier that morning. Because there was no tear in the shirt he was wearing, the officers asked him to show them the shirt he was wearing when the accident occurred. Penry responded that he'd be glad to and informed them the shirt was at his house (SF IV 142-44; XIV 1579-81, 1645-46, 1676-77). *Miranda* rights were again read in connection with Penry's signing a consent to search form at 12:10 p.m. (SF IV 144-47; XIV 1581-83, 1601-03, 1646, 1677-86; XVIII St.Ex. 7; XX St.Ex. 18).

The officers and Penry returned to the house and retrieved the shirt (SF IV 148-49; XIV 1604, 1646, 1686-88). Penry was then asked if he would accompany them to the crime scene and he agreed (SF IV 150; XIV 1604-05, 1648, 1689-90). Penry said, "I'll go with you, just don't try to pin anything on me I didn't do"

[4]*Miranda v. Arizona*, 384 U.S. 436 (1966).

(SF XIV 1648, 1690). The officer responded he wouldn't do that. At the deceased's house, Penry remained in the car unrestrained. After about thirty to forty minutes, Penry initiated a conversation by stating, "I want to tell you about it" (SF IV 151-52; XIV 1608-10, 1618). Officer Nelson testified, "I told him to just to be quiet. I didn't want to hear it. I told him to just shut up." Penry responded, "No, I want to get it off my conscience. I done it, and I want to get it off my conscience" (SF IV 151-52, 154; XIV 1618). Penry was placed under arrest (SF XIV 1625) and Officer Grissom then re-read Penry his *Miranda* rights (SF IV 153-54; XIV 1619-20, 1651-53). Penry then reiterated his desire to tell the truth (SF IV 154). Penry was taken into the house, where he described the crime, pointed out the scissors used to stab the deceased, and identified his pocket knife[5] (SF IV 154-55, 181-82; XIV 1620, 1723-24). He then was searched and returned to the station (SF IV 181-82; XIV 1622, 1717-18), where he again was advised several times of his right and subsequently signed a written confession (SF IV 189-93, 214-15; XIV 1835-36, 1850-53; XV 1872-93, 1979).[6]

On October 26, 1979, Penry agreed to give hair samples, was again administered *Miranda* warnings, and signed a consent to search form (SF IV 195-96). On that date, Texas Ranger Maurice Cook again read and explained to Penry his *Miranda* warnings (SF IV 223-25; XV 1865, 1874-77, 1988-91). Penry gave a second verbal confession, which was reduced to writing and read to him in its entirety, including the warnings. An addition was made by Penry, and the statement

[5]The officer's description of Penry's actions at the crime scene was not admitted before the jury (SF XIV 1742).

[6]This statement as it was presented to the jury appears in Vol. XV 1895-1902.

was witnessed and signed (SF IV 227-32, 240-44; XV 1866, 1877-78, 1992-99, 2043-47, 2050-53).[7]

Prior to trial Penry filed notice of his intention to raise the defense of insanity at the time of the offense (J.A. 2), a motion for a pretrial competency hearing (J.A. 5), and a motion for appointment of a psychiatrist to examine him with regard to both issues (J.A. 7). The court granted the motion for a psychiatrist (J.A.) and conducted a separate jury trial on the issue of competency (SF V-VII).

At the competency hearing, Dr. Jerome Brown, a clinical psychologist, testified on behalf of Penry. He testified that Penry was retarded, with the mental age of a six-and-one-half-year-old and the social maturity of a nine to ten-year-old (J.A. 41), but that he "does a pretty good job talking" and "is able to converse fairly well" (J.A. 42). On cross-examination, Dr. Brown reviewed the records of Penry's previous commitments to mental institutions, which indicated that Penry's EEGs were within normal limits (J.A. 53), that he had been diagnosed as "border line retarded" (J.A. 57) and that while institutionalized he had persisted in a pattern of aggressive anti-social behavior which included setting fires (J.A. 58-59), attacking other patients (J.A. 58-59) and sexually attacking younger boys (J.A. 54, 59). In Dr. Brown's opinion, Penry is "very obnoxious" (J.A. 55) and egocentric:

> Q He doesn't really care about his fellow man or anybody around him. He's interested in Number One. Would that be fair to say that?

[7]This second statement appears in evidence at the guilt phase with reference to extraneous offenses removed (SF XV 1999, 2022-31).

> A I think it is fair. He just doesn't have the ability to understand other people in that way and understand the world in that way. He's focused on himself pretty much from one moment to the next.

(J.A. 56). Dr. Brown also opined that other patients' attacks on Penry could be due to his sexual harassment of them (J.A. 54-55). The jury found Penry competent (SF VII 944-45).

At the guilt-innocence phase of the trial on the merits, a psychiatrist, Dr. Jose Garcia, testified for Penry. He reiterated Dr. Brown's diagnosis of organic brain damage and moderate mental retardation, which, in his opinion, led him to believe Penry was insane at the time of the offense (J.A. 86-87).

The state introduced the testimony of two psychiatrists to rebut the testimony of Dr. Garcia. Dr. Kenneth Vogtsberger testified that in his opinion Penry was not suffering from any mental illness or mental defect at the time of the offense and that he was not legally insane (J.A. 144-45). As for Penry's mental retardation, Dr. Vogtsberger testified that "I certainly agree that he tests out on the IQ test as having below average intelligence, but I felt that overall his alertness and understanding of what goes on with himself and with, you know, the social environment that he would not be diagnosed or fit into a category of being globally mentally retarded." (J.A. 146). Dr. Vogtsberger further testified "he [Penry] wasn't given all the opportunities to learn and benefit from educational experiences that might have allowed him to test out at a higher IQ, and I agreed with the opinion that under a more stimulating environment his IQ might be significantly higher." (J.A. 148). Dr. Vogtsberger diagnosed Penry as having characteristics consistent with an anti-social personality (J.A. 150).

Dr. Felix Peebles then testified for the state. He also diagnosed Penry as being sane (J.A. 170) but having "a full-blown anti-social personality" (J.A. 171), a diagnosis which he believed to be supported by Penry's medical history:

> A Well, back early in life, the history listed that he had temper tantrums, setting fires. He got quite a bit of excitement out of setting fires. He exhibited cruelty to animals, cruelty to his peers, and had much difficulty in generally with all of his interpersonal relationships.
>
> Q Would this be consistent with the ultimate development of an anti-social personality?
>
> A Yes.

(J.A. 179).

Dr. Garcia then testified in rebuttal at the guilt-innocence phase of trial (J.A. 180 *et seq.*).

Following the jury's verdict of guilt, the punishment phase of trial was held; both Dr. Peebles and Dr. Vogtsberger were called by the state. Dr. Peebles testified that Penry was dangerous, constituted a threat to society and would continue to do so (J.A. 200). Dr. Vogtsberger testified that there was "a high probability" that Penry would commit criminal acts of violence that would constitute a continuing threat to society (J.A. 208).[8]

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[8]The doctors' testimony was tailored to the second statutory special issue submitted to the jury on punishment. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1986) (J.A. 27).

After the prosecutor's opening argument on punishment, both of Penry's attorneys argued on his behalf. First, Mr. Wright made a plea for mercy in which he argued that the state, in requesting the death penalty, was attempting "to strip from you the thin veneer of civilization and return you to savagery." (J.A. 218) whereas "[o]ur appeal is to your intellect and to your sense of Christian love." (J.A. 219). Wright then argued that the death penalty is not a deterrent (J.A. 219-220) and referred to various Christian sects which oppose it (J.A. 220). Counsel concluded his argument by focusing directly on Penry's mental condition and its relevance to the punishment issues, particularly the first question:

> I think that it probably goes without saying that a more intelligent criminal is one who is more likely to evade capture and evade prosecution, and even evade the death penalty. But isn't a person of greater intelligence more culpable and not less. Now, is that fair or is that right? Mr. Keeshan spoke with you about deliberateness in the first special issue. He seemed to equate it with intentional, and you've already decided about intentional. That word then must mean more than merely intentional. Y'all are all familiar, for example, with the Elmer Wayne Hendley case down in Houston, a mass murder case that took place over a long period of time. Deliberate. You're also familiar say with the Ignacio Cuevas case that took place down in Huntsville, or the facts did. Where a group of convicts got together and planned a breakout and killed some folks breaking out. Deliberateness. We've heard about the news of this Gacy case up in Chicago or

near Chicago, where he supposedly killed all these young boys over a long period of time. That's deliberateness. That's the kind of case where possibly the death penalty was intended by our State laws. I think also there's been a lot of evidence here about Johnny Paul Penry's mental condition and mental state. Certainly you have to believe that his mental state was not healthy. He's mentally ill. Certainly you know that his environment played a part in this. Think about each of those special issues and see if you don't find that we're inquiring into the mental state of the defendant in each and every one of them.

(J.A. 220-21).

Penry's other trial attorney, Mr. Newman, continued in the same vein, emphasizing Penry's deprived childhood and mental deficiencies and how they bore on the first punishment issue:

Is there any pride to taking the life of any person, much less a person which the evidence has shown here was an afflicted child at the age of nine. The records reflect that this boy had an afflicted mind at the age of nine and we can't get around that. The records reflect that later on when he went to school up there for three years and he was taken out by his parents who apparently--or something must be wrong with them to have taken him away from a place that there might have been some control, some possibility at least, where he could be cared for instead of bringing him back into the environment where his mental condition would be worsened by the

treatment that he no doubt received. And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience.

(J.A. 222).

I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer. You heard the evidence on the original guilt or innocence, and here they brought to you this packet from the prison. They brought you this record from the Polk County Court House. Here, this defendant was charged with aggravated rape, and instead of convicting him of aggravated rape, and even then, there must have been some doubt as to the mentality of this boy at that time. Why? They had one of their main witnesses here, Dr. Peebles, who's like a rubber stamp, who probably could not make a living out in the private practice of medicine, come in and say, he is of sound mind. I would be willing to bet that unless, he is a gibbering idiot that he's like some of those psychiatrists who they have in Harris County who come in to look at them and then get on the witness stand and say that this man is of sound mind. But now, he comes in here and he predicts that this boy in all reasonable probability will continue to get into trouble. That may

> be true. But, a boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of you juror's minds that there is something definitely wrong, basically, with this boy. And I think there is not a single one of you that doesn't believe that this boy had brain damage as they found it at the University of Texas, when they ran those tests and formed those conclusions.

(J.A. 223-34).

SUMMARY OF ARGUMENT

The Texas capital-sentencing statute suffers from no constitutional infirmity, either on its face or as applied to Penry. The statute allows for the admission of any relevant evidence in mitigation of punishment and in no way circumscribes the jury's consideration of such evidence during its deliberations on the statutory special issues. No additional instructions are necessary to channel the jury's consideration of such evidence, and Penry has wholly failed to demonstrate how his requested instructions would have aided the jury or produced a more reliable sentencing determination. Similarly, Penry has not shown that the mitigating evidence he offered has any relevance outside the scope of the statutory special issues.

Here, defense counsel was able to argue to the jury that the evidence offered by Penry was of such a nature that it militated in favor of negative answers to the special punishment issues. The only other conceivable significance of the evidence was that it might influence the jury to dispense mercy regardless of its views on how the punishment issues should be

answered. To hold that capital defendants have a constitutional entitlement to mercy would effectively reintroduce to capital sentencing procedures the very arbitrariness which the Court denounced in *Furman v. Georgia*, 408 U.S. 238 (1972).

There is no need for the trial court to define the terms used in the Texas punishment issues. The words have obvious common-sense meanings which jurors can readily understand without additional definitions. Moreover, inasmuch as defense counsel are free during argument to define the terms in a way which is favorable to the defendant, the absence of instructions by the court actually may inure to defendants' benefit.

There is no merit to Penry's assertion that the eighth amendment bars the execution of mentally retarded prisoners under sentence of death. First, there is no national consensus to support such a proposition, in contrast to what the Court found in *Thompson v. Oklahoma*, ___U.S.___, 108 S. Ct. 2687 (1988). Second, the safeguards already in place in the criminal justice system adequately address the mental state of subnormal defendants such as Penry. Finally, to accept Penry's argument would effectively relegate to mental health professionals an area of concern that has long been exclusively the province of the judiciary.

ARGUMENT

I.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED IN THIS CASE PROVIDED FOR JURY CONSIDERATION OF ALL OF PENRY'S RELEVANT MITIGATING EVIDENCE WITHOUT THE NECESSITY OF ADDITIONAL JURY INSTRUCTIONS.

After both sides had rested at the punishment phase of Penry's trial, the court submitted three special issues to the jury in accordance with Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1986).[9] In addition to receiving the special issues, the jury was instructed by the court on such things as the burden of

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[9]The special issues were:

> Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(J.A. 27-28).

proof and the procedure to be followed in answering the issues (J.A. 25-7). The court instructed the jury on its consideration of the evidence as follows:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

(J.A. 26).

Penry made a series of objections to the court's proposed jury charge, all of which were overruled (J.A. 210-13). Penry now contends that the court's dismissal of five of his objections violated his rights under the eighth and fourteenth amendments. Specifically, he asserts that the trial court should have granted his requests that the charge define the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society." In addition, he asserts that the court should have instructed the jury that the state was required to prove beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, and that, if the jury felt that Penry did not deserve a death sentence, even though it was convinced beyond a reasonable doubt that the punishment issues should be answered affirmatively, it could return a "no" answer. Finally, even though the court instructed the jury to consider all of the evidence, Penry contends the charge should

have included the words "whether aggravating or mitigating in nature."

A. *Penry's claim is virtually identical to the one decided adversely to his position in Franklin v. Lynaugh. ___U.S.___, 108 S.Ct. 2320 (1988).*

1. Penry was able to introduce and argue the significance of all of the mitigating evidence he wished to place before the jury.

During both the guilt-innocence and punishment phases of the trial, Penry introduced evidence of his mental impairment and of the abusive treatment he received as a child. Penry contends that without the requested instructions, the jury was unable, under the Texas capital punishment scheme, to give the constitutionally required consideration to this mitigating evidence. *See Hitchcock v. Dugger*, ___U.S.___, 107 S.Ct. 1821 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

In response to a challenge similar to the one posed by Penry, a four-justice plurality of the Court in *Franklin v. Lynaugh*, ___U.S.___, 108 S.Ct. 2320 (1988), held that Franklin was not circumscribed in his ability during the punishment phase of his trial to present and argue mitigating evidence of his good behavior while incarcerated and "residual doubt" regarding his guilt, although the plurality expressed considerable reservation whether such "residual doubt" was constitutionally required to be considered by a sentencing authority. Moreover, the plurality held that the two special issues submitted to Franklin's jury did not limit its consideration of such mitigating evidence. *Id.* at ___, 108 S.Ct. at 2326-30. In particular, the plurality noted that the aspects of Franklin's evidence

that might arguably have given rise to "residual doubts" were relevant to and could be fully considered by the jury in answering the first special issue. *Id.* at ___, 108 S.Ct. at 2328. Likewise, the jury was "free to weigh and evaluate [Franklin's] disciplinary record" in prison as a mitigating factor in resolving the second special issue. *Id.* at ___, 108 S.Ct. at 2329.

The same is true in Penry's case. Like Franklin, Penry does not argue that the structure of the Texas capital punishment statute in any way precluded him from introducing relevant mitigating evidence of his character or background. Indeed, the record reflects that he introduced extensive evidence, from both expert and lay witnesses, about his mental deficiencies and about the mistreatment he received as a child (J.A. 78-137). He does not contend that there was any additional relevant evidence he was unable to introduce. Rather, like Franklin, Penry argues that his mitigating evidence was not self-evidently relevant to the special issues and that, without his proposed instructions, the jury might have been unable to consider the evidence in reaching its punishment decision. His argument has no more merit than did Franklin's.

2. Any evidence that would tend to lessen the defendant's culpability for his crime or to show that he could be rehabilitated can be considered within the framework of the Texas punishment issues.

For the most part, the Court has restricted its examination of the states' capital-sentencing statutes to the procedure by which a death sentence is imposed and has left the states free to determine what substantive factors are sufficiently important to be considered by the sentencing authority. As Justice O'Connor noted

in *California v. Ramos*, 463 U.S. 992, 999-1000 (1983): "'It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision*," quoting *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (emphasis added in *Ramos*). Some limitations on the states' power in this area do exist, however. Thus, excessively vague standards for imposing the death penalty are violative of the eighth amendment, *Godfrey v. Georgia*, 446 U.S. 420 (1980), as are statutes requiring mandatory death sentences. *Sumner v. Shuman*, ___ U.S.___, 107 S.Ct. 2716 (1987); *Woodson v. North Carolina*, 428 U.S. 280 (1976). In addition, the states cannot impose a death sentence on the basis of evidence that the defendant was not allowed to explain or deny. *Gardner v. Florida*, 430 U.S. 349 (1977). Finally, the states cannot preclude the defendant from introducing, or the sentencing authority from considering, relevant mitigating evidence offered in support of a sentence less than death. *Hitchcock*, ___ U.S. at___. 107 S.Ct. at 1824; *Lockett v. Ohio*, 438 U.S. 598, 604 (1978). Penry alleges that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence, unless the jury is specifically instructed to take the evidence into account.

The cases in which the Court has been concerned with the introduction and consideration of a defendant's mitigating evidence have consistently referred to "relevant mitigating evidence." *Hitchcock*, ___ U.S. at ___, 107 S.Ct. at 1824; *Eddings*, 455 U.S. at 114; *Lockett*, 438 U.S. at 604; see also *Franklin*, ___ U.S. at ___, 108 S.Ct. at 2333 (O'Connor, J., concurring) (noting that *Eddings* holds "that the sentencer must consider 'any *relevant* mitigating evidence'") (emphasis added in *Franklin*). Although never expressly defined,

"relevant mitigating evidence" has been held to refer to "any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 455 U.S. at 114; *Lockett*, 438 U.S. at 604.[10] In those instances in which the Court has held that specific kinds of evidence were relevant and mitigating, the evidence has had some bearing on the defendant's personal responsibility and moral guilt for his crime, or on those aspects of his character that are indicative whether he will be a future danger.[11]

Put another way, the Court has never held that any evidence is mitigating standing by itself, in isolation from the manner in which it relates to society's relevant sentencing considerations. Thus, for example, a defendant's history of drug abuse would not necessarily be mitigating evidence unless it were

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[10]The Texas Court of Criminal Appeals has consistently held that a capital defendant must be allowed to present *any* relevant mitigating evidence. That court does not hesitate to reverse convictions in cases where such evidence was excluded. *See Burns v. State*, ___S.W.2d ___, No. 69,641 (Tex. Crim. App. Oct. 19, 1988), attached hereto as Appendix A.

[11]Such evidence includes the defendant's prior record, *Shuman*, ___U.S.___, 107 S. Ct. 2716, 2725-26 (1987); *Lockett*, 438 U.S. at 598; youth, *Shuman*, ___U.S. at ___, 107 S. Ct. at 2726; *Eddings*, 455 U.S. at 116; *Lockett*, 438 U.S. at 598; lack of specific intent, *Tison v. Arizona*, ___U.S.___, 107 S. Ct. 1676 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Lockett*, 438 U.S. at 598; relatively minor role in the crime, *Shuman*, ___U.S. at ___, 107 S. Ct. at 2726; *Lockett*, 438 U.S. at 598; difficult family history, *Hitchcock*, ___U.S. at___, 107 S. Ct. at 1824; *Eddings*, 455 U.S. at 116; emotional disturbance, *Hitchcock*, ___U.S. at ___, 107 S. Ct. at 1824; *Shuman*, ___U.S. at ___, 107 S. Ct. at 2725; *Eddings*, 455 U.S. at 116; adjustment to prison, *Franklin*, ___U.S. at ___, 108 S. Ct. at 2329; *Skipper v. South Carolina*, 476 U.S. 1, 4 (1987); and the influence of alcohol and drugs, *Shuman*, ___U.S. at ___, 107 S. Ct. at 2725.

shown that he was under the influence of drugs at the time of the offense, or was so dependent on drugs that his judgment was distorted, both of which could reduce his moral culpability for the crime, or unless it were shown that with treatment the drug habit could be eliminated and the defendant would no longer "need" to engage in crime to support his drug habit, which would relate to his future dangerousness. In each of these instances, the evidence could be considered mitigating because there would be a direct relationship between the defendant's drug problem and his crime or his propsects for rehabilitation. Without evidence of this kind of nexus, however, the mere fact that a defendant was an abuser of drugs would have no mitigating value. Or, as Justice O'Connor expressed it:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant.

California v. Brown, ___U.S. at ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring) (emphasis added).[12]

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[12]More positive aspects of a defendant's character--for example, lack of a history of violent behavior, repeated acts of kindness, or some creative talent--can be introduced to demonstrate that the defendant would not be a danger in the future, and can be considered by the jury in answering the Texas special punishment issues. Like the negative aspects of a defendant's character discussed by Justice O'Connor in *California v. Brown*, this evidence has no mitigating value beyond its relevance to the statutory punishment considerations.

3. Jurors can readily perceive the relevance of Penry's mitigating evidence to the punishment issues.

The Texas punishment issues focus the jury's attention on precisely those aspects of the individual defendant and his crime to which Justice O'Connor adverted, and no additional instructions are necessary to allow for jury consideration of any mitigating evidence. The first special issue asks the jury to determine whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1) (Vernon Supp. 1988). This inquiry involves more than reconsidering whether the defendant acted with the requisite criminal intent to be guilty of the offense, *Heckert v. State*, 612 S.W.2d 549 (Tex.Crim.App. 1981), and addresses this Court's concern for individualized sentencing in that it directs the jury's attention to his personal responsibility and capacity for moral action. *See Green v. State*, 682 S.W.2d 549 (Tex.Crim.App. 1981), *cert. denied,* 470 U.S. 1034 (1985); *Meanes v. State*, 668 S.W.2d 366 (Tex.Crim.App. 1983), *cert. denied*. 466 U.S. 945 (1984).

In Penry's case, evidence of his mental retardation clearly was relevant to this first issue. His expert witness testified that, due to his mental condition, he lacked normal impulse control and, consequently, acted without the kind of thought and reflection expected of people of normal intelligence (J.A. 78 *et seq.*). The jury was free to consider whether Penry's mental retardation rendered him incapable of acting deliberately. Further, defense counsel in his final argument at the punishment phase offered the jury examples of murders that could be considered

deliberate--murders carried out over a long period of time with sufficient opportunity for the perpetrators to reflect on their actions and their consequences, and murders involving torture of the victims--and argued that Penry's mental condition prevented him from acting with the same kind of culpability (J.A. 220-21). The relevance of Penry's evidence to the first special issue is manifestly apparent, and the jury was free to consider it and to give it appropriate weight in its deliberations.

Evidence of Penry's abusive childhood also was relevant to whether his conduct was deliberate. Testimony at trial reflects that Penry's mother beat him on the head with a belt with a large metal buckle. Penry's sister also testified that their parents used to lock Penry in his room for hours without attention or supervision. To the extent that the jurors believed that Penry's crime was attributable to those experiences, they were able to consider and weigh them in assessing his personal responsibility as expressed in the first special issue, *i.e.*, his capacity to act deliberately. *Cf. Eddings*, 455 U.S. at 108 n.2 (defendant offered expert testimony at trial to effect that at the time he shot and killed policeman, he was in his own mind shooting his abusive stepfather, who also was a policeman).

Similarly, the second special issue asks whether there is a probability that the defendant would commit future acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. Ann. art. 37.071(b)(2) (Vernon Supp. 1988). Penry was free to introduce evidence that his crime was attributable to the abusive treatment he received as a child, but that his behavior could be controlled in a restricted environment such as prison. Such evidence would be highly relevant to the question whether a defendant would be a future danger to society, and the

jury can readily understand its significance during the punishment deliberations.

Finally, the third special issue inquires into whether the defendant's act in causing the death of the deceased was unreasonable in response to the victim's provocation, if any. Tex. Code Crim. Proc. Ann. art. 37.071(b)(3) (Vernon Supp. 1988).[13] Evidence of retardation, diminished mental or emotional development, or severe abuse as a child is relevant to this issue, in that actions inappropriate for a person not so afflicted could be reasonable for a person of reduced capacity. The jury could readily appreciate the relevance of Penry's evidence as it related to this special issue and give weight to it in reaching its decision.[14]

Moreover, Penry's jury was instructed to consider all of the evidence that had been introduced in both phases of the trial (J.A. 26). The instruction Penry requested differed from that given by the court only in that it defined all of the evidence with the phrase "whether aggravating or mitigating in nature" (J.A. 212). He has made no attempt to demonstrate how his instruction provided the jury with any further guidance than that contained in the court's charge and in the special issues themselves. As was the case with the somewhat more detailed proposed instructions in *Franklin*, the denial of the requested instruction here did not restrict the jury in its consideration of his

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[13]By statute, the first two special issues are submitted to the jury at the penalty phase of every capital murder trial in Texas. The third issue is submitted only if raised by the evidence. The third issue was submitted at Penry's trial.

[14]During final argument, counsel stressed to the jury that each of the special issues was "inquiring into the mental state of the defendant" (J.A. 221).

mitigating evidence. *See Franklin*, ___U.S. at ___, 108 S.Ct. at 2328.

The fact that the jury was not persuaded by Penry's evidence indicates only that it ascribed less weight to the evidence than he does, not that the evidence was excluded from consideration.[15] Penry is simply dissatisfied because, although he was able to present all of the relevant mitigating evidence he had available and the jury was able to consider it, the jury did not find the evidence sufficient to justify answering any of the special issues negatively. Because the evidence did not have the decisive effect on the jury that it has on himself, Penry contends that the evidence could not have been fully considered because of the structure of the statute. The Court has recognized, however, that it is the sentencer's function to determine the weight that should be given to the evidence before it. *Eddings*, 455 U.S. at 114-15 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence."); *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence). The fact that a capital murder defendant disagrees with the conclusion reached by the jury does not mean that the jury was precluded from considering, or failed to consider, all of the evidence he introduced.

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[15]Penry, like Franklin, does not appear to quarrel with Texas' third special issue on punishment, whether, if raised by the evidence, the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Proc. Ann. art. 37.071(b)(3) (Vernon Supp. 1988). This issue clearly allows a defendant, at the very least, to present mitigating evidence that he "reasonably believed provided a moral justification for his conduct." *Sumner v. Shuman*, ___U.S. at ___, 107 S.Ct. at 2725.

The Constitution does not require that evidence introduced in a capital-sentencing hearing be exclusively mitigating or aggravating. That both the state and the defendant might be able to use the same evidence to support opposing contentions does not offend the Constitution, as long as the jury is not precluded from considering the mitigating aspects of the evidence. Evidence relating to punishment is circumstantial, and like any circumstantial evidence, it is susceptible of more than one interpretation. It is for the sentencer to determine what weight each aspect of the evidence receives. Penry has failed to identify any relevant mitigating evidence that the jury is precluded from considering under the Texas statute.

Penry's argument appears to be that the defendant must be given the exclusive right to determine what evidence is mitigating and what is aggravating; once he designates certain evidence as mitigating, the state would be precluded from rebutting it. This Court has never devised a rule that removes the adversary process from any aspect of a capital murder trial, nor should it. Factors such as cross-examination, the state's bearing the burden of proof beyond a reasonable doubt, and the weighing of evidence by a jury drawn from a fair cross-section of the community are fundamental components of the system that has been shown to be the greatest truth-finding process known to man. Removing adversarial testing of evidence from the penalty phase of a capital murder trial can hardly promote the rational and even-handed imposition of the death penalty, nor would it ensure the enhanced reliability of such sentencing determinations.

B. *Penry's mitigating evidence has no relevance to the eighth amendment's sentencing concerns beyond the scope of the Texas punishment issues.*

1. Neither Penry nor his supporting *amici* identify any such relevance.

Concurring in the judgment in *Franklin*, Justice O'Connor, joined by Justice Blackmun, agreed that Franklin's mitigating evidence of his good behavior while incarcerated was adequately addressed by the second special issue because such evidence was relevant only to the aspect of his character relating to his potential for future violence. The concurrence disagreed, however, with the plurality's suggestion that the states may fashion their sentencing procedures and thereby channel the jurors' consideration of mitigating evidence, and instead suggested that if mitigating evidence were offered that was not relevant to the special issues or had relevance beyond the scope of the issues, then the Court would have to determine whether such a limitation violated the Eighth Amendment. *Franklin v. Lynaugh*, ___U.S. at ___, 108 S.Ct at 2332-35 (O'Connor, joined by Blackmun, J., concurring). Penry himself, as well as *amicus* Billy Conn Gardner ("Gardner"), acknowledge that Penry's mitigating evidence was relevant to the Texas special issues and could be considered by the jury, without an additional instruction, during its punishment deliberations. They contend, however, that evidence of his retardation and mistreatment as a child had relevance beyond the scope of the issues and that, without an

instruction directing the jury's attention to the mitigating evidence, it could not be fully considered.[16]

Despite the assertions of Penry and the *amici*, they make no attempt whatsoever to explain how the mitigating evidence he offered has any relevance to valid sentencing considerations beyond the scope of his personal culpability addressed by the first special issue. In *Franklin*, the petitioner likewise argued that evidence of his adjustment to prison life demonstrated aspects of his character that were relevant to the sentencing consideration beyond the scope of the special issues. The Court held that his evidence reflected only on his probable future dangerousness and, thus, was encompassed by the second issue. *Franklin*, ___U.S. at ___, 108 S.Ct. at 2329. Franklin at least gave examples how his evidence might have been relevant beyond the scope of the issues. Penry makes no such effort. The only suggestion as to any additional relevance of this evidence is the statement in the brief of the Texas Association that mental disease and childhood deprivation "might be mitigating in that they may lead the jury to exercise mercy." (Brief for Texas Association at 15). Assuming Penry's argument is that his evidence is relevant because of its capacity to evoke feelings of sympathy in the jury and that the Texas statute does not allow jurors to express such feelings, his argument is flawed in two respects.

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[16] *Amici* Harris County Criminal Lawyers Association ("Harris Association") and Texas Criminal Defense Lawyers Association ("Texas Association") assert that Penry's evidence was irrelevant to the Texas special issues but argue that it had relevance beyond the scope of the issues and could not be fully considered by the jury without an instruction from the court.

2. Sympathy should not be constitutionalized as a part of the capital sentencing process.

Penry's contention fails in the first instance because there is no constitutional requirement that the sentencing authority be able to express feelings of sympathy in its sentencing decision. The Court has recognized that the occasional granting of mercy to a defendant does not violate the Constitution. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). The Court also has approved the Texas statute while noting that the death penalty is mandatory if the jury affirmatively answers all of the special issues. *Jurek v. Texas*, 428 U.S. 252, 278 (1976) (White, J., concurring); *see also Lowenfield v. Phelps*, ___U.S.___, ___, 108 S.Ct. 546, 554 (1988). Further, in *California v. Brown*, ___U.S. at ___, 107 S.Ct. at 840, the Court expressly held that there is no constitutional violation in instructing the jury that it is not to be swayed by mere sentiment or sympathy in making its capital-sentencing decision. Such factors should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *Brown*, ___ U.S. at ___, 107 S.Ct. at 840.

There are sound reasons why capital murder defendants should have no constitutional entitlement to mercy. Above all else, the eighth amendment is concerned with the reliability of the sentencing decision in capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *Eddings*, 455 U.S. at 874; *Lockett*, 438 U.S. at 625; *Woodson*, 428 U.S. at 305. To introduce sympathy as a constitutionally required element of the capital sentencing process would remove all rationality from the procedure and allow juries to base their verdicts on emotion, and even prejudice, rather than on the evidence. Such a result would effectively constitute

a return to the arbitrary and capricious imposition of the death penalty denounced in *Furman v. Georgia*, 408 U.S. 238 (1972). Because juries at that time were given no guidance in making their sentencing decisions, the *Furman* Court found that the death penalty was being imposed in a wanton and freakish manner. *Id.* at 310 (Stewart, J., concurring).

Texas' response to *Furman* was to craft a statute that channels the jury's sentencing discretion by requiring it to answer questions about the defendant's personal responsibility and moral guilt for his crime, and about the likelihood that he would be a threat to society in the future. The statute imposes on the state the burden of proving beyond a reasonable doubt two, and sometimes three, additional aggravating factors beyond what is required by the Constitution. *Jurek v. Texas*, 428 U.S. at 273-74; *see Lowenfield*, 484 U.S. at ___, 108 S.Ct. at 555.[17] The defendant is able to introduce whatever evidence in mitigation he wishes to put before the jury. As has been demonstrated above, any conceivable mitigating evidence is relevant to at least one of the special issues, and counsel is free to argue to the jury how the evidence supports a sentence less than death. The state is required to persuade each of the twelve jurors, beyond a reasonable doubt, that each of the special issues must be answered affirmatively, and the defendant has the minimal burden of raising a reasonable doubt in the mind of only one juror with respect to only one of the issues in order to receive a sentence of life imprisonment. Put another way, even if the jurors' votes on the three special issues stand 35-1 in favor of the state, the

[17]Penry's assertion that "[t]he first two special issues are actually aggravating factors while the third issue is a mitigating factor" (Petitioner's Brief, hereinafter "Pet. Br.," at 9), thus misperceives the nature of the special issues.

defendant nonetheless will be sentenced to life imprisonment rather than death. Tex. Code Crim. Proc. Ann. art. 37.071(e) (Vernon Supp. 1988).[18] *Cf. Mills v. Maryland*, ___U.S.___, 108 S. Ct. 1860, 1865-66 (1988) (it is impermissible to require jury to unanimously agree on presence of mitigating factor before it can decide not to impose death sentence).

The trial court, as it did in this case, instructs the jury to consider all of the evidence presented at trial in making its decision, reminds it that the state bears the burden of proof beyond a reasonable doubt, and informs it that the jurors must agree unanimously before any of the special issues can be answered affirmatively. All of these safeguards ensure that death sentences in Texas represent a reasoned response to the evidence and ensure a reliable sentencing result. They would be undermined by requiring the jury to consider whether the defendant should be spared because the jury feels sympathy for him. Were the Court to adopt this position, the state's efforts to guide the jury's discretion would be rendered a nullity, and the jury's answers to the special issues would be meaningless. After focusing on the defendant before it and on the factors relevant to the sentencing determination, the jury then would have to be asked to ignore the evidence and to abandon rationality, deciding simply, on the basis of emotion and whim, whether the defendant should be sentenced to death or to life imprisonment.

Constitutionalizing mercy as a factor in the process of imposing the death penalty would make it

[18]Most states require that the jury find by a preponderance of the evidence that mitigating circumstances exist and that they outweigh the aggravating factors before a life sentence may be imposed. Texas' system requires much more of the state and imposes a far lighter burden on the defendant.

impossible to distinguish from the record "the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring). Appellate review, one of the elements of capital sentencing statutes that the Court has hailed in the past for bringing rationality into the system, *Gregg v. Georgia*, 428 U.S. at 198, would be impossible. If the Court is prepared to accept Penry's argument that the consideration of mercy is a constitutional requirement, then it will have traveled full circle since *Furman*, holding that the very aspect of capital punishment that once made it unconstitutional totally unguided juror discretion--now is necessary to comply with the eighth amendment. *Cf. Lockett*, 438 U.S. at 631 ("By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sum as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.") (Rehnquist, J., concurring in part and dissenting in part).

3. The Texas system allows jurors to express feelings of sympathy while retaining the rationality of the process for imposing a death sentence.

Moreover, Penry is mistaken in his belief that the Texas statute does not allow for the jury's consideration of feelings of sympathy. When the Court invalidated the state's exclusion for cause of prospective jurors whose verdicts would be "affected" by the possibility of a death sentence, it recognized that the jurors' responses were likely to be expressions of the seriousness or gravity with which they invest their deliberations, their emotional involvement in the facts of the case, or that the prospects of the death penalty "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt."

Adams v. Texas, 448 U.S. 38, 49-50 (1980). In the same way, feelings of sympathy related to an aspect of the defendant's crime or character may be expressed by the manner in which a juror ascribes weight to the defendant's mitigating evidence or in which he determines what constitutes a reasonable doubt. Thus, the Texas system not only provides the jury with a mechanism for taking into account its human feelings of sympathy in weighing the evidence before it, it does so in a manner that does not destroy the rationality of the sentencing process. *See Franklin*, ___U.S. at ___n. 12, 108 S.Ct. at 2331 n. 12.

Penry attempts to strengthen his claim by arguing that the jurors are required to take an oath under Tex. Penal Code § 12.31(b) (Vernon 1973) that the mandatory penalty of death or imprisonment for life will not affect their deliberations on any issue of fact. This argument is legally and factually incorrect. Under Texas law, no § 12.31(b) oath is required. *White v. State*, 629 S.W.2d 701, 704 (Tex. Crim. App. 1981). The oath administered to the jury is set forth in Tex. Code Crim. Proc. Ann. art. 35.22 (Vernon 1966).

> You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and evidence, so help you God.

The voir dire of Evelyn Stephens, the first juror selected, reflects that the Article 35.22 oath was the one administered (SF VIII 169). After the jury had been selected, the jurors were sworn as a group (SF XIII 1333). Texas law provides that the Texas appellate court presume the jurors were properly sworn in accordance with Article 35.22. Tex. Code Crim. Proc. Ann. art. 4424a (Vernon Supp. 1987). Further, as the Texas Court of Criminal Appeals found, Penry conceded on direct appeal that the state did not inquire if the venire members would be affected by the prospect of the death penalty, and no venire member was excluded under § 12.31(b). *Penry v. State*, 691 S.W.2d at 656. The record does not bear out Penry's claim that the jury was sworn under § 12.31(b).

C. None of Penry's other requested instructions would have increased the reliability of the result of the sentencing proceeding.

Before the jury was instructed at the penalty phase of the trial, Penry objected that the charge contained no definition of the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society," as used in the punishment issues (J.A. 210-11). He also objected that the charge failed to instruct the jury that a death sentence could not be imposed unless the state proved beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and that the jury could return a negative answer to one of the special issues if it felt that Penry should not be executed, even if it found beyond a reasonable doubt that the issues should be answered affirmatively. The objections were overruled (J.A. 210-13). Penry contends that the charge as given reduced his jury argument to "jury nullification" and effectively precluded the jury from considering his mitigating evidence.

Unless a term is specially defined by the Legislature, "[a]ll words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language...." Tex. Code Crim. Proc. Ann. art. 3.01 (Vernon 1974). The Texas Legislature has considered the terms in the special punishment issues to have meanings sufficiently understood

by ordinary jurors that it has not specially defined them. This Court, too, has recognized that the terms in the punishment issues contain a "common-sense core of meaning" that juries are capable of comprehending without additional definition. *Pulley v. Harris*, 465 U.S. 37, 49 n.l0 (1984), quoting *Jurek v. Texas*, 428 U.S. at 279 (White, J., concurring). Penry has made no attempt to demonstrate how the jurors in his case could have understood the words to mean anything significantly different, much less that their understandings of the terms prevented them from giving effective consideration to his mitigating evidence.[19] If the terms did "strike distinct chords in individual jurors, or play to differing philosophies and attitudes, nothing more is at work than the jury system." *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984), *cert. denied*, 471 U.S. 1930 (1985). Penry and other capital murder defendants can urge during argument that the jury accept a definition of the terms that works most to their advantage. To this extent, they may actually benefit by not having definitions provided by the trial court.

Penry's claim concerning the court's failure to instruct the jury that the state must prove beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors likewise is without merit. The jury was informed of the effects of its answers to the special issues, and it was instructed that the state must prove beyond a reasonable doubt that the punishment issues should be answered

[19]It should be noted that although Penry objected to the court's charge for failing to include definitions of these terms, he did not submit proposed definitions of his own. At no time during the extensive litigation of his claims in the state and federal courts has he suggested how the terms might be defined to render a more rational result.

affirmatively (J.A. 25). In determining whether the state had met its burden, the jury necessarily had to consider whether the mitigating evidence raised a reasonable doubt as to the issues. Because the jury knew that three affirmative answers to the special issues would result in the death penalty being imposed, it was "likely to weigh mitigating evidence as it formulate[d] these answers in a manner similar to that employed in 'pure balancing' States." *Franklin*, ___ U.S. at ___n. 12, 108 S.Ct. at 2331 n. 12. Penry has shown neither that the trial court's failure to give his requested instruction prevented the jury from considering his mitigating evidence, nor that giving such an instruction would have enhanced the reliability of the result.

Finally, Penry's claim that the jury should have been instructed that it could return an answer of "no" to one of the punishment issues even though it was convinced beyond a reasonable doubt that the answer should be "yes," simply because it felt that the death penalty should not be imposed, is foreclosed by *Jurek*. In upholding the constitutionality of the Texas capital sentencing statute, the Court approved the Texas system of assessing the death penalty after the jury has returned affirmative answers to the special issues. To hold that Penry's requested charge must be given in Texas capital murder trials would require overruling *Jurek*. Inasmuch as Penry expressly renounces any intention to have the Court overrule *Jurek*, his claim must fail. *See Franklin*, ___U.S. at ___, 108 S.Ct. at 2330.

II.

IT IS NEITHER CRUEL NOR UNUSUAL TO EXECUTE A DEATH-SENTENCED INMATE WHO IS OF LIMITED MENTAL CAPACITY BUT WHO WAS ADJUDGED SANE AT THE TIME OF THE OFFENSE AND COMPETENT TO STAND TRIAL AND WHO UNDERSTANDS THE NATURE OF THE PENALTY HE IS TO SUFFER AND THE REASON HE IS TO SUFFER IT.

Penry relies on *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Thompson v. Oklahoma*, ___U.S. ___, 108 S. Ct. 2687 (1988), to support his assertion that the eighth amendment proscription against cruel and unusual punishment forbids the execution of the mentally retarded. Inasmuch as those decisions focus on the mental state of the defendant at different stages in the criminal justice process, Penry is urging alternative bases for his position.

In *Ford*, there was no question as to the defendant's sanity at the time of the offense or his competency to stand trial. It was only after he was convicted and sentenced to death that Ford began to manifest delusions indicative of severe mental illness. The Court, relying heavily on the common law, held that the eighth amendment prohibits the execution of an insane prisoner. *Ford*, 477 U.S. at 410. Justice Powell, in concurrence, expressed the opinion that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422. (Powell, J., concurring).

Although Penry relies on *Ford* to the extent he argues that he fits within the class of "idiots or

lunatics," that case does not support his position. Whereas *Ford* was concerned with the prisoner's mental state at the time of execution, the test proposed by Penry focuses on the defendant's mental state at the time of commission of the offense:

> The reason for not executing a mentally retarded person is that he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his crime. Mental retardation is a factor that mitigates against assessing the maximum punishment of death. Accordingly the test for determining if a mentally retarded defendant can be executed should be whether because of mental retardation the defendant has a deficit in adaptive behavior that significantly reduces his ability to learn from mistakes.

(Pet. Br. at 37) (citation omitted).

The state thus understands Penry's argument to be that his mental retardation is akin to insanity at the time of the offense, inasmuch as both defenses are concerned with the defendant's state of mind at the time he engages in criminal behavior. Penry raised an insanity defense at trial, and the jury rejected it. Penry now analogizes himself and other mentally retarded defendants to youthful offenders, who by virtue of their age and inexperience, are generally regarded as less culpable for their actions. *Thompson v. Oklahoma*, ___U.S. at ___, 108 S. Ct. at 2698-2700.

A. *There is no national consensus that mentally retarded prisoners should not be executed.*

In *Thompson*, a plurality of the Court attached particular importance to what it found to be a national consensus that offenders younger than sixteen when they commit their crimes cannot be put to death. To determine the existence of such a consensus, the plurality looked to relevant legislative enactments and jury determinations, *id.* at ___, 108 S. Ct. at 2691-92, which provided "significant affirmative evidence of a national consensus...." *Id.* at ___ n. *, 108 S. Ct. at 2711 n. * (O'Connor, J., concurring). Here, by contrast, Penry has not offered similar data regarding society's views on the execution of persons of his mental caliber. Indeed, to the extent there is any such evidence before the Court, it undermines rather than supports Penry's position.

The *Thompson* plurality found significant that of the thirty-seven states which have capital sentencing statutes, eighteen had established a minimum age of at least sixteen. *Id.* at ___, 108 S. Ct. at 2695. On the other hand, only one state, Georgia, currently forbids the execution of retarded prisoners. Thus, insofar as legislative enactments are pertinent to the Court's inquiry, they strongly indicate that society condones the execution of mentally impaired prisoners such as Penry who commit barbaric homicides.

As for jury determinations, Penry has proffered nothing for the Court's consideration. Instead, he relies on two public opinion surveys and the views of a professional organization, the American Association of Mental Deficiencies, hereinafter "AAMD." (Pet. Br. at 38-39). They are wholly unpersuasive. Penry first refers to a survey commissioned by Amnesty

International, hardly an unbiased source inasmuch as that organization categorically opposes the death penalty. Neither that poll nor the Georgia State survey cited by Penry offer any definition of the phrase "mentally retarded," thus casting some doubt on the accuracy of their results. Indeed, in the Georgia State survey, sixteen percent of those polled were inquisitive enough to respond that their opinion would depend on the degree of mental retardation involved (J.A. 283). Penry offers a definition of mental retardation which includes persons with IQs of 70 or below or upward through 75 or more (Pet. Br. at 36). One must wonder how the results of the poll would have differed had the respondents been apprised of this definition.

The Amnesty International poll is equally flawed. As in the Georgia State poll, the question regarding execution of the mentally retarded embraces no other relevant facts. While the survey indicated that only twelve percent favored the death penalty for a mentally retarded defendant, it also found that an overwhelming majority favored executing a defendant who had committed a series of murders (88%), opened fire on a restaurant full of people (83%) or killed a police officer in the line of duty (72%). What, then, of a mentally retarded defendant whose crime fits into one of those categories? Or, more to the point, what of a mentally retarded defendant who breaks into a woman's home, brutally rapes her, stabs her repeatedly with a pair of scissors and then leaves her covered with blood and moaning for help?

Because of their methodological flaws, both of the surveys cited by Penry fall far short of establishing the sort of national consensus the Court found in *Thompson*. "The most reliable objective signs consist of the legislation that the society has enacted. It will rarely if ever be the case that the members of this

Court will have a better sense of the evolution in views of the American people than do their elected representatives." *Thompson*, ___U.S. at ___, 108 S. Ct. at 2715 (Scalia, J., dissenting). If public sentiment is in fact in accord with the polls upon which Penry relies, it would seem that that view would have found expression in legislation proscribing the execution of those similarly situated to Penry. That it almost uniformly has not further underscores the dubiousness of their validity.

Penry's reliance on the AAMD is even more unavailing. Other than Penry's assertion that that organization has nearly 10,000 members, he has offered no reason why its views should be accepted by the Court. Compared to the many millions of citizens who reside in this country, 10,000 persons all belonging to a single profession constitute a "small and unrepresentative segment of our society.... " *Thompson*, ___U.S. at ___, 108 S. Ct. at 2719 (Scalia, J., dissenting). Moreover, the Court in the past has refused to be bound by the views of organizations made up of mental health professionals. The American Psychiatric Association has 70,000 members, yet the Court has rejected its position, being unpersuaded "that the view of the APA should be converted into a constitutional rule...." *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983).

B. *Constitutional and statutory safeguards currently in place adequately protect the interests of mentally retarded inmates such as Penry.*

Penry argues that a blanket proscription against the execution of mentally retarded prisoners is necessary to satisfy the dictate of the eighth amendment that punishment shall be neither cruel nor

unusual. According to Penry, he should not be executed because "he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his crime." (Pet. Br. at 37). In so arguing, Penry wholly fails to acknowledge the following constitutional and statutory provisions which the state must satisfy before it can validly execute him:

1. That he was sane at the time of the offense, *i.e.*, that "as a result of mental disease *or defect*, [he] either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated." Tex. Penal Code Ann. § 8.01(a) (Vernon 1974); (emphasis added)[20] (*see* Tr. 106);

2. That he was competent to stand trial, *i.e.*, that he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as a factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960); J.A. 20);

3. As discussed, *supra* at 21-24, that his act was deliberate, that he probably will be a danger in the future and that his act was unreasonable in response to any provocation. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987); (*see* J.A. 27-28); and

4. That he is sane at the time of his execution. *Ford v. Wainwright.*

---

[20]The above quoted statute was in effect at the time of Penry's trial. It since has been amended to delete the phrase "or was incapable of conforming his conduct, etc." *Id.* (Vernon Supp. 1987). Both versions of the statute include the phrase "mental defect" and thus are broad enough to encompass mentally impaired defendants such as Penry.

All of these safeguards are designed to ensure that capital defendants of subnormal intellect receive the type of individualized consideration which the Constitution requires. In particular, the insanity defense and the Texas punishment issues are concerned with the accused's mental state at the time of the offense. The jury must find the defendant to be sure before it may convict him of a capital offense and must consider his mitigating evidence of retardation before it may assess a sentence of death. Penry has wholly failed to suggest how a total ban against the execution of the mentally retarded will in any way render the system more evenhanded or how individual sentencing determinations will thereby be more reliable. This Court should refuse to impose additional requirements on the states when the above provisions already in effect "are adequate means of vindicating the constitutional rights of the accused." *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 268 (1982).

C. *This Court should not relegate administration of the criminal justice system to mental health professionals.*

Penry provides the Court with a psychiatric definition for mental retardation and then claims the reason executing mentally retarded persons is cruel is different than that for the insane, since the psychiatric symptoms of mental retardation and insanity differ. In doing so, Penry explicitly urges the Court to adopt clinical standards of mental illness to decide who should face execution. In *Ford*, however, the Court grounded its prohibition against the execution of insane people upon no such interpretation of clinical standards of mental illness. Rather, the Court looked to the common law understanding of mental deficiency for

guidance, expanding the reach of its principles from the determination of criminal responsibility and competence to stand trial to cover the execution of capital sentences. Justice Marshall, writing for the majority, harked back to the common law in order to find that executing the insane prisoner in *Ford* would be cruel:

> This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of the insane. It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England.

Ford, 477 U.S. at 408-09. Justice Powell, writing in a concurring opinion, concluded that the boundaries of "insanity" under the eighth amendment mirrored those found in the common law:

> The bounds of that category [mental state] are necessarily governed by federal constitutional law. I therefore turn to the same sources that give rise to the substantive right to determine its precise definition: chiefly our common law heritage and the modern practices of the States, which are indicative of our "evolving standards of decency."

Id. at 419. "Evolving standards of decency" under the eighth amendment, then, means not the latest pronouncement of academics or professional societies or the results of the most recent public opinion survey, but those mores and concepts tested by English and American courts over the centuries. When used in the legal sense, terms such as "insanity" and "mental retardation" derive their meaning not from current psychiatric standards but from their common law roots.

The history of the insanity defense illustrates this point. English and American courts at common law, when deciding whether to absolve defendants of criminal responsibility on grounds of insanity, have shunned a slavish adherence to medical categories. Instead, courts have studied the effect of a defendant's mental deficiency on his ability to make sound moral judgments. The English Court of Common Pleas, for example, formulated what is commonly known as the "Wild Beast Test" in the early eighteenth century case of *Rex v. Arnold*, 16 How.St.Tr. 695 (1724):

> ...it must be a man that is totally deprived of his understanding and memory, and *doth not know what he is doing*, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.

Arnold, 16 How.St.Tr. at 765 (emphasis added).

A century later, the House of Lords fashioned the most famous test for deciding which mentally deficient people should go free from criminal liability in *Daniel M'Naughten's Case*, 8 Eng. Rep. 718 (H.L. 1843). Under the M'Naughten Rule, a court cannot convict a defendant if, at the time he committed the act, he labored under a defect of reason or from a disease of the mind that either prevented him from knowing the nature and quality of his acts or that clouded his moral judgment to such a degree that he did not know his act was wrong. The M'Naughten Rule is based not on clinical labels slapped on the defendant by experts, but instead on the defendant's ability to grasp common sense notions of right and wrong.

The broad language of the common law insanity tests have spilled over the narrow channels of

psychiatric categories. As a result, American courts have applied insanity tests to defendants with a large assortment of mental disorders, including mental retardation. Courts consistently have held that mental retardation, in itself, excuses no defendant from criminal responsibility where there is no evidence that a defendant is incapable of fathoming the difference between right and wrong, thus warranting no insanity instruction to a jury. *E.g., State v. Pinski*, 163 S.W.2d 785, 788 (Mo. 1942); *State v. Johnson*, 290 N.W. 159, 162 (Wis. 1940); *Wartena v. State*, 5 N.E. 20, 23 (Ind. 1886). Almost all American jurisdictions, Texas included, now consider mental retardation or subnormality to be a form of "mental defect" within their common law and statutory insanity defenses. 2 P. Robinson, *Criminal Law Defenses* 314 nn. 2,3 (1984).

The common law's functional, rather than clinical, approach to mental deficiency and criminal responsibility has carried over to areas such as competence to stand trial and the execution of death sentences. Early English courts, for instance, were more interested in a defendant's ability to understand the nature of the proceedings against him and to present a defense than if he fit into some medical category. As Blackstone elaborated:

> [I]f a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?

4 W. Blackstone, Commentaries of the Law of England *24.

That a functional measure of competence, rather than a clinical one, has determined incompetence was demonstrated in the nineteenth century by the North Carolina Supreme Court in *State v. Harris*, 53 N.C. (8 Jones) 136 (1860). The *Harris* court held that a deaf mute prisoner, who could not be made to understand the meaning of his trial, was incompetent to stand trial, just as one who is mentally deficient: "[w]hether arising from physical defect or mental disorder, he must, under such circumstances, be deemed 'not sane,' and . . . he ought not to be tried." *Id.* at 143.

The unflagging allegiance of English and American courts to functional, instead of clinical, tests hardly results from judicial backwardness or mere historical accident. Using psychiatric categories to judge the mental deficiency of those who face execution presents serious problems.

First, reliance on psychiatric categories would prove inequitable over time, since such categories can change so as to alter the scope of a constitutional right without the benefit of a legislative or judicial act. For instance, the American Psychiatric Association considered homosexuality a clinical mental disorder until the 1970's. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S.Cal.L.Rev. 527, 557 (1978). By the same token, experts at one time did not consider sociopathy to be a mental disease but then subsequently recognized it as such. *See Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959).[21] Moreover, deciding who should be executed on the basis of purely psychiatric arguments would replace the discretion of courts with the tyranny

[21] For more on the pitfalls of measuring and defining the human intellect, see S. J. Gould, *The Mismeasure of Man* (1981).

of experts, as the Pennsylvania Supreme Court warned in *Commonwealth v. Elliot*, 89 A.2d 782 (Pa. 1952):

> [t]his contention carries the theory...to an extreme and would vest in a psychiatrist and not in the Courts the right and power to determine and fix punishment for crimes...and would inevitably result in a further break down of law enforcement and eventual confusion and chaos.

Id. at 785.

Penry, on the other hand, would have courts try to force defendants into psychiatric pigeon-holes, which may or may not bear any logical relationship to whether a defendant comprehends the consequences of his actions or society's act of retribution against him. Penry's arguments fly in the face of well settled constitutional and common law principles. While Penry bombards the Court with psychiatric and opinion survey evidence, he offers the Court no compelling reason why it should casually discard legal concepts that have served both English and American courts well for hundreds of years. Penry provides no clue as to how these rules were somehow unjustly applied in his case. He gives the Court little, if any, guidance of what workable alternative standards the Court could adopt to decide which mentally deficient persons would be exempt from execution.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX A

WILLIAM BURNS, Appellant

No. 69,641 v. Appeal from BOWIE County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of the offense of capital murder, and, in accordance with affirmative answers rendered by the jury to the three special issues submitted at the punishment phase pursuant to Article 37.071, V.A.C.C.P., the trial court assessed his punishment at death. Direct appeal to this Court is automatic. *Id.*

Appellant challenges sufficiency of the evidence to support the jury's affirmative answer to special issue two, which inquires "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Thus we turn to the evidence adduced, beginning with the circumstances of the offense itself, which this Court has repeatedly held may alone sustain an affirmative answer to special issue two if "severe enough." E.g., King v. State, 631 S.W.2d 486 (Tex.Cr.App. 1982); Muniz v. State, 573 S.W.2d 792 (Tex.Cr.App. 1978); Burns v. State, 556 S.W.2d 270 (Tex.Cr.App. 1977).

While every murder committed in the course of a robbery is "senseless," Roney v. State, 632 S.W.2d 598 (Tex.Cr.App. 1982), neither the facts of the instant offense, nor appellant's participation therein, appears so heinous or shocking as to evince a particularly "dangerous aberration of character." *King v. State*, supra, at 504; Cass v. State, 676 S.W.2d 593, at 593 (Tex.Cr.App. 1984). The record shows that sometime close to midnight on Friday, March 27, 1981, twenty-

two year old appellant and two companions, his brother Victor, and Danny Ray Harris, proceeded to the Texarkana Wood Preserving Company with the apparent intent to rob whomever they might find working there. Appellant had at one time worked the late shift at the creosote plant, and "would have known" an employee would be working late to stoke the fire in the boiler. Furthermore, appellant could have anticipated this person would be carrying an appreciable sum of money because he knew Friday was payday. There is some indication appellant was under the influence of "dope" of an unspecified powdered variety which he had ingested through his nose sometime shortly before the three set out.

What happened at the creosote plant may be gleaned from a pair of statements appellant gave afterwards. As they approached the plant, appellant carried a .22 caliber Winchester rifle that Victor had retrieved from the trunk of his car. Additionally, tucked into appellant's pants was a .22 caliber pistol. Through a crack in the tin wall of the "treating room" of the plant, appellant observed Johnny Lynn Hamlett, the deceased, an eighteen year old high school senior, who was working the late shift that night. His cohorts urged appellant to shoot Hamlett with the rifle. Instead appellant handed it to Harris, who stepped around to a "big opening . . . on the side where the conveyor belt goes in." Appellant pulled out the pistol and fired off the only two rounds it contained through the crack. Next appellant "heard the rifle start popping off." Ten or eleven shots were fired from the rifle, in appellant's estimation.[1] According to the

[1]Expert testimony established Hamlett sustained fourteen gunshot wounds. Eight .22 caliber "hulls" shown positively to have been fired from the Winchester rifle were found at the scene. Eleven bullets were recovered from the body. Ballistics tests

(footnote continued on next page)

autopsy, Hamlett died "of multiple gunshot wounds of the neck, chest and head."

Harris took Hamlett's wallet, emptied it of the $110.00 it contained, which he split with Victor, and, after starting to throw the wallet away, gave it instead to appellant, who "didn't have a billfold and . . . wanted one." Appellant had the wallet on his person when he was arrested several weeks later. Inside the wallet police found a brief newspaper article chronicling early stages of the investigation of Hamlett's killing.

In final argument the prosecutor invited the jury to find appellant guilty as a party on the basis of the above evidence, thus:

> "We had to prove that William Burns did this. You have seen the evidence of that. You have seen and heard his statement where he tells you he shot twice. You remember the law of parties? If you aid, encourage, assist in any way? It's in the charge. You can read it. He told you he did that."

At the punishment stage it was shown that approximately a year before the murder of Hamlett, on the night of February 23, 1980, appellant was involved in another killing in the parking lot of a nightclub. With appellant apparently somewhere nearby, his brother Victor shot one Leon Callahan in the back. The shot proved fatal. Appellant asked Victor, "did he get him." Then the two Burns brothers "grabbed"

(footnote continued from previous page)
indicated seven of these could have been fired from the Winchester rifle. Two more were definitely not fired from the Winchester, but could have come from a pistol. Origin of the last two bullets could not be determined to any degree.

Callahan's companion, Bryan Sanders, and forced him into their car. On the way out of the parking lot Victor shot at Callahan's tires. With appellant driving, they started out for Texarkana Lake, where, the brothers told Sanders, he was to be killed. Instead appellant stopped the car on the side of the highway. He told Sanders he had a shotgun in the trunk and proceeded to open it. When Sanders intervened, a fistfight ensued. Within a minute or two a passing Highway Patrolman arrived to stop the altercation. Appellant and his brother were arrested.

Two police officers testified they knew appellant's reputation in the community for being peaceable and lawabiding to be bad. With this, the State rested. No psychological or psychiatric testimony was presented relating to appellant's potential for future dangerousness. Other than the unadjudicated murder and kidnapping, the State presented no criminal record or past criminal history. Appellant produced five citizens and three family members to testify his reputation for peaceableness was good. No other mitigating evidence was admitted.

Over the past dozen years this Court has articulated its standard for appellate review of sufficiency of evidence to support an affirmative answer to special issue two in a number of ways. We have consistently said we view the evidence in the light most favorable to the jury's answer, e.g., Starvaggi v. State, 593 S.W.2d 323, 325 (Tex.Cr.App. 1979),[2] without clearly explicating what view of the evidence

[2]*Starvaggi* cites Warren v. State, 562 S.W.2d 474 (Tex.Cr. App. 1978) and Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1977), as authority for this standard. Although as a practical matter each of those opinions may "view the evidence in the light" Judge Phillips found they do in *Starvaggi*, neither opinion expressly indicates that is the standard being utilized therein.

would *be* the most favorable in light of the jury's constitutional function to weigh any proffered evidence in mitigation. In other instances, seemingly more mindful of that function, we have held that the evidence was such that "the jury was justified in finding that the aggravating factors outweighed the mitigating factors[,]" e.g., Duffy v. State, 567 S.W.2d 197, 209 (Tex.Cr.App. 1978); Demouchette v. State, 591 S.W.2d 488, 492 (Tex.Cr.App. 1979); thus suggesting "a more substantive review" of the evidence than had been conducted in other cases. See Dix, Appellate Review of the Decision to Impose Death, 68 Geo.L.J. 97, 151 (1979). As if to disown that notion, however, the Court has at least on one occasion combined these two pronouncements, finding that "the evidence, viewed in a light most favorable to the verdict, is sufficient for the jury to have found that the mitigating factors introduced by appellant did not outweigh the aggravating factors and that there is a probability that appellant would commit acts of violence that would constitute a continuing threat to society." Green v. State, 682 S.W.2d 271, 289-90 (Tex.Cr.App. 1984).[3] Recent decisions have abandoned altogether the inquiry whether the evidence would justify a jury finding that aggravating factors outweighed mitigating. Instead, the Court has begun

[3]Viewing mitigating evidence in the light most favorable to the jury's answer in this particular context may mean in some cases actually considering evidence proffered in mitigation, such as youth, drug dependency, a history of child abuse, etc., though in a broader sense it may "moderate blameworthiness," nevertheless to militate in favor of an affirmative answer in the narrower confines of special issue two itself. See Stewart v. State, 686 S.W.2d 118, 125-26 (Tex.Cr.App. 1984) (Clinton, J., dissenting). Thus, not only do we fail to instruct juries they may accord independent weight to factors that are in the broader sense "mitigating," *id.*, manifestly we also fail to recognize the independent significance of such evidence on appeal.

to apply an unadulterated Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard, beginning with Fierro v. State, 706 S.W.2d 310 (1986). A typical articulation of the standard appears in Harris v. State, 738 S.W.2d 207, at 225-26 (Tex.Cr.App. 1986):

> "When we view the facts, we must evaluate the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have made the finding beyond a reasonable doubt."

See also Alexander v. State, 740 S.W.2d 749, 761 (Tex.Cr.App. 1987) (" . . . applying the 'rational trier of fact' test . . . ."); Livingston v. State, 739 S.W.2d 311, 340 (Tex.Cr.App. 1987) ("whether the evidence . . . would lead any rational trier of fact to make the finding . . . ."). Thus has the Court narrowed its focus on appeal to "whether a rational trier of fact could have found the elements of Art. 37.071(b)(2), supra, beyond a reasonable doubt[,]" Keeton v. State, 724 S.W.2d 58, 61 (Tex.Cr.App. 1987), opining that this appellate standard will adequately serve to "make certain that the death sentence is not 'wantonly or freakishly' imposed[.]" *Id.*, at 63.[4] See also Beltran v. State, 728 S.W.2d 382, 389-90 (Tex.Cr.App. 1987); Cockrum v.

[4]Thus, also, have we abandoned any pretense of this Court balancing mitigating and aggravating evidence so as to determine, independently of the jury's verdict, the "appropriateness" or "justness" of imposition of the death sentence in a given case. See *Dix*, supra at 150-51. In view of Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), it is doubtful whether Eighth Amendment or Due Process considerations absolutely require this Court to reweigh punishment evidence, though our "prompt judicial review of the jury's decision" was an important consideration in the Supreme Court's imprimatur of our death penalty scheme. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

State, ___S.W.2d___ (Tex.Cr.App., No. 69,766, delivered September 14, 1988).

Measuring the evidence adduced in the instant case to prove future dangerousness against this standard, we find, not without some trepidation, that it is sufficient. Though it is likely the jury accepted the prosecutor's invitation to convict appellant as a party to Danny Ray Harris' act of shooting Hamlett repeatedly with the .22 rifle, appellant himself admitted to firing his pistol twice at the deceased, and at least two of the recovered bullets appear to have come from that gun. See n. 1, *ante*. Though acting at the instigation of his companions, appellant was under no duress or domination so far as the record reveals. Approximately a year before, appellant participated as a party to his brother's killing of another individual, and took a principal role in the aggravated assault and kidnapping of yet another. Thus the record reflects at least a bare repetition of deadly violence on appellant's part toward others. There was evidence, albeit contested, that his reputation for peaceableness was not good. Finally, a reasonable jury might have inferred from his possession of the newspaper clipping that appellant took a dispassionate, or even prideful view of his part in Hamlett's death.

We would not say on this quantum of evidence that appellant has been proven beyond peradventure to be completely incorrigible. However, following our precedents, we conclude it represents more than a "mere modicum" of evidence to support the jury's conclusion it is probable he would commit criminal acts of violence that would constitute a continuing threat to society. *Jackson v. Virginia*, U.S. at 319-20, S.Ct. at 2789, L.Ed.2d at 573-74. This point of error is overruled.

In his second point of error appellant contends the trial court erred in failing to admit testimony offered at the punishment phase of trial from his mother relative to his family background and his employment history. We agree.

Appellant called his mother, Vergie Burns, as his last witness at the punishment phase. She testified appellant was the second oldest of seven children, and that her husband had died six years before trial, which would have been around the time appellant committed the instant offense. Over relevancy objectons, counsel next attempted to explore appellant's family and employment background, in the following exchange:

> "Q All right, were you and [your husband] together all the time you were married?
>
> [Prosecutor]: Your Honor, . . . we would object on the basis of relevance.
>
> THE COURT: Sustained."

Mrs. Burns next testified appellant had grown up in her home and had finished high school. Then:

> "Q What type of jobs did [appellant] have after he finished school?
>
> [Prosecutor] Your honor -- excuse me. Once again we would object on the basis of relevancy.
>
> THE COURT: Sustained."

Her brief testimony concluded with her assertion she did not think appellant "will be a threat to anyone in the future."

Immediately before the punishment charge was read, appellant made the following bill of exceptions outside the jury's presence:

> "Q Were you and your husband together all the time that you were married?
>
> A We separated for a few years, but we still communicated with each other.
>
> Q Your Honor, had we been permitted to have that question answered, I would have followed it up with questions to develop it further. Can I do that at this time?
>
> THE COURT: No, that's not a part of that. I sustained the objection to one single question as being immaterial and irrelevant to any issue before the Court. You can make your bill on those questions, only.
>
> Q The other question is as follows, Mrs. Burns. What types of jobs did [appellant] have after he finished school?
>
> A He worked at St. Michael's Hospital, he worked over to the wood preserving plant, and he worked at Central Christian Church.
>
> Q Is that all? Is that all?
>
> A That's all I can think of."

Counsel did not request that the trial court reopen the evidence so that he could propound followup questions before the jury pertaining to appellant's upbringing. See Article 36.02, V.A.C.C.P.

In Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the Supreme Court held that "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, U.S. at 304, S.Ct. at 2991, L.Ed.2d at 961. Because North Carolina's mandatory provision precluded such consideration, it was struck down as violative of "the fundamental respect for humanity underlying the Eighth Amendment." *Id.* Subsequently, building upon the *Woodson* foundation, a plurality of the Supreme Court held in Lockett v. Ohio, 438 U.S. 602, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, U.S. at 604, S.Ct. at 2964-65, L.Ed.2d at 990. Exclusion of such evidence, it was observed, "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990. A majority of the Court later embraced the holding of *Lockett*, supra, in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). There the Court opined:

> "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

Id., U.S. at 114-15, S.Ct. at 877, L.Ed.2d at 11. See also Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, 481

U.S.___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Franklin v. Lynaugh, 487 U.S.___, 108 S.Ct.___, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring).

In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 929 (1976), the Supreme Court premised its recognition of the constitutionality of our death penalty procedure on the understanding that Article 37.071, supra, would prove sufficiently flexible to allow jury consideration of "all possible relevant information about the individual defender whose fate it must determine." *Id.*, U.S. at 276, S.Ct. at 2958, L.Ed.2d at 941. Citing *Woodson v. North Carolina*, *supra*, the Court first observed:

> "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."

Id., U.S. at 271, S.Ct. at 2956, L.Ed.2d at 938. The Court then upheld our statutory scheme because it found:

> "Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that . . . the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

In conclusion the Court reiterated:

> "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function."

Id., U.S. at 276, S.Ct. 2958, L.Ed.2d at 941.

In Quinones v. State, 592 S.W.2d 933, at 947 (Tex.Cr.App. 1980), this Court observed, in keeping with *Jurek v. Texas*, and *Lockett v. Ohio*, both supra, that the defendant "was entitled to present evidence of any mitigating circumstances..., including a broad discussion of his personal and family background." The instant case does not present a question, as in *Quinones*, supra, of whether an instruction was necessary to explain the use the jury could put that evidence to. Indeed, *Quinones* itself teaches that "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence."[5] Thus, we presume the jury will understand the significance of evidence proffered in mitigation, and will give such evidence mitigating weight, at its discretion, in resolving special issues. Today we treat only the question whether such evidence should have been admitted.

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[5]Whether the jury will also understand the "logical relevance" of evidence which has potentially mitigating weight and significance independent of its applicability to special issues is, at least to the mind of the instant writer, a separate question. See *Franklin v. Lynaugh*, supra (O'Connor, J., concurring); Penry v. Lynaugh, 832 F.2d 915 (CA5 1987).

We hold that it should have been. Mrs. Burns' answer to the question pertaining to the stability of her marriage during appellant's upbringing at least tended to show a troubled childhood. While failing to request a reopening of the evidence to proffer further questions along these lines before the jury, appellant at least made it clear he was prepared to do so if permitted. That subsequent to finishing high school appellant obtained employment in such venues as a hospital and a church would surely prove informative to a jury engaged in the necessarily speculative enterprise of assessing his ability to coexist peacefully in society.

We have held that Article 37.071, supra, affords the trial court wide discretion at the punishment phase of a capital murder trial in deciding admissibility of evidence. E.g., Smith v. State, 683 S.W.2d 393, 405 (Tex.Cr.App. 1984); Turner v. State, 698 S.W.2d 673, 675 (Tex.Cr.App. 1985). We conclude that the trial court in the instant cause abused that discretion in failing to admit Mrs. Burns' answers. It is true that the mitigating impact of those answers would not appear to be compelling in the abstract. On the other hand, though this Court's precedents dictate a finding that the evidence is legally sufficient to support the jury's reply to special issue two, neither do we believe the State's evidence in support of that verdict to be particularly compelling. We cannot say that, on balance, the jury could not have found appellant's proffered evidence of some, perhaps even critical significance. Consistent with *Lockett*, supra, and its progeny, and particularly in light of the limited role this Court has assumed in reviewing appropriateness of death verdicts in capital cases, we cannot tolerate the risk that appellant has been sentenced to death in spite of factors a reasonable jury could find justify the less severe penalty of life imprisonment.

Accordingly, the judgment of the trial court is reversed and the cause is remanded for new trial. Article 44.29(c), V.A.C.C.P.

CLINTON, Judge

(Delivered: October 19, 1988)
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Teague, J., concurs in the result.
Onion, PJ. and Davis, McCormick and White, JJ., dissent.